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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 308.

ELLIS G. HUGHES, PLAINTIFF IN ERROR,

vs.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY (LIMITED).

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED NOVEMBER 28, 1887.

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1 DISTRICT OF OREGON, *ss:*

I certify that on the 28th day of December, 1886, at Portland, Multnomah county, in said district, I duly served the within citation on writ of error upon the therein-named Dundee Mortgage and Trust Investment Company, Limited, by delivering to Hugh Roger, agent of said company, personally a true copy of said citation on writ of error, duly certified to by me as U. S. marshal for said district.

PENUMBRA KELLY,
United States Marshal,
By ED. D. CURTIS, *Deputy.*

1½ UNITED STATES OF AMERICA, *District of Oregon,* } *ss:*

To the Dundee Mortgage and Trust Investment Company, Limited, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October, A. D. eighteen hundred and eighty-seven, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Oregon, wherein Ellis G. Hughes is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this Dec. 28th, 1886.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

Filed Dec. 28, 1886.

R. H. LAMSON, *Clerk.*

[Endorsed:] No. 1069. U. S. circuit court, district of Oregon. Hughes *vs.* D. M. & T. I. Co. Citation on writ of error. Filed Dec. 28, 1886. R. H. Lamson, clerk.

2 & 3 In the Supreme Court of the United States.

ELLIS G. HUGHES
vs.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, Limited. } No. 1069. Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition

of the judgment of a plea which is in the said circuit court, before the Honorable Matthew P. Deady, one of you, between Ellis G. Hughes, plaintiff and plaintiff in error, and The Dundee Mortgage and Trust Investment Company, Limited, defendant and defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by complaint doth appear, and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and eighty-seven, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this December 28, 1886.

R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon,
By R. B. LAMSON,
Deputy Clerk.

Seal United States Circuit Court, Oregon.

[Endorsed:] 1069. In the Supreme Court of the United States. Ellis G. Hughes *vs.* The Dundee Mortgage and Trust Investment Company, Limited. Writ of error.

4 * * * * * * *

In the Circuit Court of the United States for the District of Oregon.
April Term, 1884.

Be it remembered that on the 11th day of September, 1884, there was duly filed in the circuit court of the United States for the district of Oregon a transcript of record from the State circuit court for Multnomah county in words and figures as follows, to wit:

5 In the Circuit Court of the State of Oregon within and for Mutnomah County.

ELLIS G. HUGHES
vs.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, Limited. } No. 1069.

Comes now the plaintiff and for cause of this his complaint alleges—

That the defendant, The Dundee Mortgage and Trust Investment Company, Limited, is a corporation duly organized and incorporated

under the laws of the United Kingdom *og* Great Britain and Ireland; that *ti* is at this time lawfully carrying on business in the State of Oregon, and that William H. Effinger, a resident of the city of Portland and a citizen of the State of Oregon and of the United States, is at this time the duly appointed and acting attorney-in-fact of said corporation, on whom service of summons may be made in all actions and suits against it in the courts of the State of Oregon or the courts of the United States within said State of Oregon.

That the said defendant was organized and incorporated as aforesaid in or prior to the year 1879, and has been since the year 1879 continuously and up to the present time carrying on business in the State of Oregon and Territory of Washington through an office or agency in the city of Portland, in said State of Oregon.

That, among other things, the business, enterprise, and object of the incorporating of the said defendant and in which it was to engage was and is in the lending of money in the State of
6 Oregon and the Territory of Washington on the security of mortgage liens on real estate situate in said State and Territory, and that that is the business in which it has been engaged in said State and Territory since the year 1879 as aforesaid.

That from the first day of January, 1879, the plaintiff has been continuously and is now an attorney-at-law, duly and regularly admitted and practising his profession in the State of Oregon and having his office and place of residence in the city of Portland, in said State.

That during the years 1879, 1880, and 1881 the plaintiff did, at the special instance and request of defendant and for its security, use, benefit, and behoof, make and issue to it, in writing and under his hand, his certain two hundred and ninety-seven separate certificates of title, which were issued as upon a like number of loans made by said defendant, a separate certificate being issued as upon each of said loans, and wherein and whereby he did, and to the extent as specified in each of said certificates and in accordance with the legal effect thereof, become responsible to said defendant that the title to the real estate taken by it by way of mortgage lien thereon as security for the repayment of the loan made by the defendant, as on which the relative certificate of title was issued, was absolute, in fee simple, in the party or parties making the mortgage thereon in favor of said defendant, and free from all manner of incumbrances or liens, and that the mortgage so made in favor of the defendant was the first lien thereon.

That the defendant undertook and agreed to pay to the plaintiff the reasonable value of the service rendered and the responsi-
7 bility assumed by him to it in issuing the certificate of title aforesaid, and that said service and responsibility was reasonably worth one per cent. on the amount of each loan respectively covered by each separate certificate of title.

That the aggregate amount of the 297 loans on and as for which the plaintiff issued a like number of certificates of title, as aforesaid, was the sum of $589,000 and the reasonable value of issueing said 297 certificates of title was and is $5,890.00, and that by reason of the issuing of said certificates of title the de-

fendant became and was and is indebted to the plaintiff in the said sum of $5,890.00.

That the defendant has never paid to the plaintiff the said sum of $5,890.00 or any part or parcel thereof, but that the whole of said sum is now justly due and owing from the defendant to the plaintiff.

That said sum of $5,890.00 and the whole thereof has been justly due and owing from the defendant to the plaintiff since the first day of January, 1882, and the plaintiff is at this time entitled to have and recover said sum from the defendant, with interest thereon, as allowed by law, since said last-named date.

That at this date, to wit, the 25th day of August, 1884, there is justly due and owing from the defendant to the plaintiff, as for principal of and interest on said sum of $5,890.00, the sum of $7,139.85.

Wherefore the plaintiff prays judgment against the defendant for the sum of $7,139.85, with interest thereon, as allowed by law,
8–48 from the 25th day of August, 1884, and for his costs and disbursements herein.

C. B. BELLINGER,
GEO. H. WILLIAMS,
Att'ys for Plaintiff.

STATE OF OREGON, } ss:
Multnomah County, }

I, Ellis G. Hughes, being duly sworn, on oath do say that I am the plaintiff in the foregoing-entitled action; that I have read the foregoing complaint and know the contents thereof, and that the same is true as I verily believe.

ELLIS G. HUGHES.

Subscribed and sworn to before me this 25th day of August, 1884.

JNO. BEVERIDGE,
[SEAL.] *Notary Public for Oregon.*

Endorsed: Filed August 25, 1884. I. N. Sanders, clerk.

49 * * * * * * *

And afterwards, to wit, on the 4th day of August, 1885, there was duly filed in said court an amended answer in words and figures as follows, to wit:

50 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES
vs.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, Limited. } No. 1069.

Now comes the defendant corporation, by Effinger and Bourne, its attorneys, and for amended answer (leave to file the same having

been given by the court on this 31st day of July, 1885) to the complaint filed herein, says:

Defendant admits the making to it of the 297 certificates of title, as alleged in the complaint; but it denies that it ever at any time undertook or agreed to pay to the plaintiff the reasonable or any value therefor either for the service rendered or the responsibility assumed by plaintiff in issuing the certificates of title aforesaid or any of them, and denies that it in any way or at all ever undertook or agreed to pay plaintiff anything for or on account of said certificates or any of them save as shall hereinafter be set out and shown; denies that said or any service thereabout or responsibility was or is reasonably or at all as against this def't worth one or any per cent. on the amount of each loan covered by each of said certificates; denies that the reasonable value of issuing said 297 certificates of title was or is $5,890.00 or any other sum of money whatever; denies that they had any value whatever, and denies that by reason of the issuing of said certificates of title or at all the defendant ever became or was or that it is indebted to the plaintiff in the said sum of $5,890.00 or in any other sum of money whatever; denies that the whole of said sum of money or that any part thereof now is or ever was justly due or owing or at all due or owing
51 from the defendant to the plaintiff; denies that said sum of $5,890, the whole thereof, or that any part thereof has been ever justly due or owing from defendant to plaintiff, or that it has been so due or owing since the 1st of January, 1882, and denies that the plaintiff is now entitled to have or recover said sum or any part thereof from defendant either with or without interest since said last date or any other time; denies that on the 25th of August, 1884, there was justly or at all due or owing from def't to pl'ff, as for principal or interest on said sum of $5,890.00, the sum of $7,139.85 or any part thereof, and denies that said def't ever at any time became or was indebted to pl'ff in any amount of money whatever for or on account of said or any certificates of title whatever.

And now, further answering said complaint and cause of action, defendant says that in the conduct of its loaning business in this State it did appoint plaintiff its attorney-at-law and did require him as such attorney to examine the various land titles offered to it as loan securities, and did require of and take from him certificates in legal effect like unto the — so alleged and pleaded in pl't'ff's complaint, but defendant says in the matter of such and said certificates it was distinctly agreed and understood by and between pl't'ff and it that in consideration of appointment by it of pl't'ff as such attorney he was not to have or make any charge whatever for making and delivering to it such and said certificates of title—that is to say, defendant controlled a large and profitable business in the was of searching titles as aforesaid upon property offered it, and it designated
52 and appointed, as it alone of right could, this plaintiff as its attorney and premitted him then to take the fees from borrowers for such and said searches upon condition and engagement by him that he should furnish to def't said certificates and wholly without charge or other compensation from it, and by said agree-

ment this defendant reserved always to itself the right to fix or adjust the scale or rate of charges so for searches to be charges borrowers.

And defendant, further answering this cause of action, says that during the whole period mentioned in the complaint plaintiff and itself acted upon and executed the engagement or agreement now here pleaded, and that each and every of the certificates in the complaint mentioned was and were made and delivered to it in pursuance and execution of such and saia agreement, and that when the said certificates were delivered by pl't'ff to def't he, pl't'ff, was upon full notice that def't did not expect to pay *to pay* for nor to be charged by him therefor, and that he never at any time prior hereto notified def't of his purpose to make or prefer any charge for the said certificates, and that def't received each and all of the said certificates so understanding and believing that they were delivered upon and under said agreement and not otherwise.

And for another defense to the plaintiff's cause of action defendant alleges that plaintiff ought not to have or maintain this action, because that on the 12th day of February, A. D. 1883, the said plaintiff commenced an action at law against this defendant in this honorable court, in his complaint in which action plaintiff stated and alleged that on August 1st, 1876, the Oregon and Washington
53 Mortgage Savings Bank, Limited, appointed plaintiff to be its attorney, and that said bank became indebted to him, plaintiff, in the sum of $5,500.00, for services rendered to it by plaintiff as such attorney between July 1st, 1876, and January 1st, 1882, in consulting and advising said bank and other acts and attendances in and about its business, at its request, and for money paid out by plaintiff in and about the said business; that plaintiff did further allege in said complaint that about June 30th, 1882, said bank amalgamated with defendant, and that defendant assumed to pay the debts and liabilities of said bank, including its indebtedness to plaintiff; that plaintiff did further allege in said complaint that said Oregon and Washington Trust Investment Company, Limited, did, about January 1st, 1876, appoint plaintiff to be its attorney to attend to its business in Oregon and Washington Territory, and that in pursuance of said appointment plaintiff did, between January 1st, 1876, and January 1st, 1880, render service to said last-named corporation in counselling and advising it about its business and other acts and attendances in and about the said business, at its request, of the value of $2,500.00 per annum, and that about January, 1880, said Oregon and Washington Trust Investment Company, Limited, amalgamated with defendant, and that defendant assumed its indebtedness and liabilities, including its indebtedness to plaintiff; and that thereafter plaintiff rendered service to defendant as its attorney and paid out money for it up to January 1st, 1882, the value of which services and amount of money combined aggregated $2,500.00; that it was also alleged in said complaint in
54 said action that defendant was indebted to plaintiff as its attorney in the sum of $224.80 for services in foreclosing a certain mortgage executed by one Elkins and fully described in said complaint,

and in the further sum of $531.00 for services rendered by plaintiff as such attorney to defendant in a certain suit in which William Reid was the plaintiff and Joseph Hill and others were the defendants, and that the aggregate of defendant's indebtedness to plaintiff upon said several accounts mentioned in said complaint was the sum of $21,258.80, for which amount judgment was in and by said complaint prayed in favor of the plaintiff and against the defendant; that defendant appeared and made defence to said action, and that such further proceedings were therein had that, upon the trial of the issues therein joined, the judgment of this court was, on August 15, 1884, rendered in favor of the plaintiff against the defendant for the sum of $8,407.61, besides the sum of $390.05 for costs and disbursements, which judgment remains and is in full force and effect and in nowise reversed or annulled.

And defendant alleges that all the service alleged in the complaint in the present action to have been performed by *by* plaintiff is claimed by him to have been rendered before the commencement of said former action, and that whatever sum of money may be due or owing to plaintiff for and on account of such service, if any be so due, was due and owing prior to the commencement of said former action, and that all of said service rendered by plaintiff to said defendant, as alleged in the complaint in this action, was performed under and by
55–93 virtue of the appointment of plaintiff as its attorney, as mentioned in said former action, and all of the service claimed by plaintiff in his complaint in this action to have been performed for this defendant was performed under and by virtue of the said appointment or designation by this defendant of plaintiff to be defendant's attorney, as specified in said complaint in said former action. Wherefore defendant alleges that plaintiff is by said former judgment forever barred and estopped from recovering herein and not to have or maintain this action.

Wherefore, the premises being considered, the defendant prays to be hence dismissed with its costs and disbursements.

EFFINGER AND BOURNE,
Def't's Attorneys.

UNITED STATES OF AMERICA, }
District of Oregon. }

I, Hugh Roger, being first duly sworn, do say that I am the agent of the within defendant corporation; that it is not a resident of nor within this jurisdiction; that the facts stated in the foregoing answer are within my observation, and that the statements of the foregoing answer are true, as I verily believe.

HUGH ROGER.

Subscribed and sworn to before me this 3rd day of August, A. D. 1885.

W. S. OTT, [SEAL.]
Notary Public in and for Oregon.

DISTRICT OF OREGON, *ss:*

I certify that on the 4th day of August, 1885, at Portland, Oregon, in said district, I served the within amended answer upon the therein-named plaintiff, Ellis H. Hughes, by delivering to him personally a copy of the said amended answer in the within-entitled suit duly certified to by the clerk of the circuit cou*e*r for said district.

PENUMBRA KELLY,
U. S. Marshal,
By P. A. MARQUAM, JR., *Deputy.*

Endorsed: Filed August 4, 1885. R. H. Lamson, clerk.

94 * * * * * * *

And afterwards, to wit, on the 15th day of April, 1886, there was duly filed in said court a reply in words and figures as follows, to wit:

95 In the Circuit Court of the United States within and for the District of Oregon.

ELLIS G. HUGHES
vs.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, Limited. } No. 1069.

Comes now the plaintiff and for his reply to the answer of the defendant herein filed alleges—

For his reply to the first separate defence in said answer pleaded—

That it is untrue, and he denies, that as to or in the matter of the certificates of title issued by him to the defendant that it was distinctly or at all agreed or understood by or between plaintiff and defendant that in consideration of any appointment of him as the attorney of the defendant or on or for any other consideration that he was not to have or made any charge whatever for making or delivering to the defendant all or any one or more of said certificates of title, or that the defendant, either as controlling a large business in the way of searching titles or otherwise, permitted the plaintiff to take any fees from borrowers upon any consideration or engagement by him that he should furnish defendant said certificates wholly without charge or other compensation from it, or that defendant reserved to itself the right to fix or adjust the scale or rate of charges so for searches to be charged borrowers.

That it is not true, and he denies, that during the whole or any portion of the time or period mentioned in the complaint
96 either he or the defendant acted on or executed the engagement or agreement now here pleaded in said answer, or that each or every or any one or more of the certificates in the complaint mentioned was or were made or delivered in pursuance of or in execution of any such agreement as is in said answer pleaded or of any

other agreement whatever, save only that the defendant should pay therefor the reasonable value thereof, or that when the said certificates were delivered by the plaintiff to the defendant that he, the plaintiff, was on full or any notice that the defendant did not expect to pay for or be charged by him therefor, or that the *the* defendant received all or any one or more of said certificates by or under any understanding or belief had with or in any manner of way arising out of anything done by him that they were delivered under any such agreement as alleged, though as to what understanding or belief the defendant may in fact have had in the matter he denies any knowledge or information sufficient to form a belief.

And as to the matters and things in said separate defence set out, he alleges the truth to be and that the facts are that the said certificates of title were by him delivered to the defendant under a contract between himself and the defendant, the terms of which were at all times as well and fully known to the defendant as to himself, and that it was at all times fully known to said defendant that he was not receiving any pay for issuing said certificates of title to it, and that if it had any such understanding as alleged in its answer it had the same in direct contradiction to the terms of said contract with him, which was not otherwise than as set out in his complaint.

For his reply to the second separate defence in said answer contained—

97 That though it is true that he brought the action alleged in said answer and in said separate defense, and that he recovered a judgement therein as alleged, that — is not true, and he denies, that said judgement is at this time in full force and effect or that it is at this time of any force or effect as an estoppel or bar in this action or as being collectable or subject to being enforced, but that the force and effect of said judgement is at this time suspended, and it is without force, and that it is not true, and he denies, that all or any of the service- alleged to have been rendered by him to the defendant and constituting the cause of action in this action were rendered under or by virtue of the appointment by plaintiff as the attorney of the defendant mentioned in said former action, so as that they formed or were any part or parcel of the cause of action set out or sued for in said former action, or so as that they could in any manner of way have been *jo*ned with the said service sued for in said former action as being or forming in any manner of way one cause of action existing in favor of the plaintiff and against the defendant, but that in truth and in fact the said service sued for in said former action and those sued for in this action arise by virtue of contracts separate in law and fact as to performance and consideration and forming and being two separate and distinct causes of action, which could in no action have been joined as one cause of action, and that it is not true, and he denies, that the plaintiff is by the said judgement rendered in said former action in any manner of way barred or estopped from recovering herein or from having or maintaining this action.

And by way of a separate and further reply to the said second separate defence in said answer contained he alleges—

98 That it is true that he brought the action alleged in said second separate defense, and that he recovered a judgement therein against the defendant herein as alleged, but that the same is at this time no bar to the maintenance of this action by him against the defendant nor is he thereby barred or estopped from having or maintaining this action or from recovering herein, for that, within ten days after the rendition of the said judgement in said former action, the said defendant, claiming and alleging that the said judgment so rendered was erroneous and contrary to law and should be reversed, in manner as by law and the rules of court in that behalf provided is provided to be done, took a writ of error in said cause to the Supreme Court of the United States, and thereby took and removed the said cause into said Supreme Court as for and to obtain a reversal of the said judgment, and did thereupon and on taking the said writ of error as aforesaid and within the ten days aforesaid from the rendition of the said judgment make and file its certain supersedeas bond or undertaking, with good and sufficient and approved security, in manner as is by law provided to be done, for the superseding of a judgment in this court rendered on the removal of the cause in which it is rendered by writ of error to the Supreme Court of the United States; and that the said cause has never been determined in the said Supreme Court of the United States nor has said writ of error ever been dismissed, but the said cause is now pending in said Supreme Court as for trial therein, and the said supersedeas bond so as aforesaid in said cause given has never been withdrawn, but the supersedeas of said judgment, by the provisions of law and the rules of court in that behalf existing, thereby created has been ever since the taking out of said writ of error, was at the commence-
99 ment of this action, and is now in full force and effect, and by reason of the matters and things aforesaid there is not now nor has there been at any time since the commencement of this action any final judgment in said former action, but said action was at the time of the bringing of this action and ever since has been and is now still pending, with no final judgment entered therein; and the said judgment entered in this court therein, as alleged in defendant's answer herein, is not the final judgment in said former action, and was at the time of the bringing of this action and ever since has been and is now of no force or effect to bar or estop the plaintiff from having or maintaining this action or from recovering herein.

And by way of a second separate and further reply to the said second separate defence in said answer contained he alleges—

That it is true that he brought the action alleged in said second separate defence, and that he recovered a judgment therein against the defendant herein as alleged; but that within ten days after the rendition of the said judgment in said former action and prior to the commencement of this action the said defendant, claiming and alleging that the judgment so as aforesaid rendered in said former action was erroneous and contrary to law and should be reversed in manner as by law and the rules of court in that behalf existing is provided to be done, took a writ of error in said cause to the

Supreme Court of the United States and gave therein the necessary bonds as for a supersedeas of the judgment therein rendered as alleged, and thereby removed said cause into the Supreme Court of the United States as for and to obtain a reversal of the said judgment, where the same is and ever since the commencement of this action has been pending as on account of and by reason of the said allegations of the defendant that there is
100 error in said judgment and that the same should be reversed; and the defendant has ever since the commencement of this action been and is now claiming the right to and seeking to have said judgment so in said former action rendered reversed, by reason of which action on the part of the defendant it is estopped from claiming any benefits or rights under said judgement or from alleging that the same is the final judgment in said former action or from pleading the same in bar of or as an estoppel to the recovery of the plaintiff in this action.

And by way of a separate and further reply to said second separate defence in said answer contained he alleges—

That at the time of the bringing of said former action and of the trial thereof he did not know that he had the claim against the defendant which is and constitutes his cause of action in this action, nor was he advised of nor did he know that the cause of action which is his cause of action against the defendant in this action existed in his favor and against the defendant until the issues had been joined in and said former action was tried.

Wherefore he prays judgment against the defendant in accordance with the prayer of his complaint.

GEO. H. WILLIAMS &
C. B. BELLINGER,
Att'ys for Pl'ff.
ELLIS G. HUGHES,
Att'y for Himself.

UNITED STATES OF AMERICA, } ss:
District of Oregon, Multnomah County, }

I, Ellis G. Hughes, being duly sworn, on oath do say that I am the plaintiff in the foregoing action; that I have read the foregoing reply and know the contents thereof, and that the same is true as I verily believe.

ELLIS G. HUGHES.

Subscribed and sworn to before me this 14th day of April, A. D. 1886.

HENRY WAGNER, [SEAL.]
Notary Public in & for Oregon.

101–128 Due service of the within "reply" is hereby accepted this 15th day of April, A. D. 1886, by receiving a certified copy thereof.

H. H. NORTHUP,
Of Att's for Def't.

(Endorsed:) Filed Apr. 15th, 1886. R. H. Lamson, clerk.

129 * * * * * * *

And afterwards, to wit, on Thursday, the 9th day of December, 1886, the same being the 48th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

130–136 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES
v.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, Limited. } No. 1069.

DECEMBER 9, 1886.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. John W. Whalley, of counsel, and moves the court for judgment upon the verdict heretofore found herein; and it appearing that the jury in and by said verdict found that the defendant was not indebted to the plaintiff for or on account of the matters alleged in his complaint:

Therefore it is considered that said defendant go hence without day, and that it have and recover of and from the plaintiff herein its costs and disbursements, taxed at fifty-eight and $\frac{90}{100}$ dollars.

137 * * * * * * *

And afterwards, to wit, on the 28th day of February, 1887, there was duly filed in said court a bill of exceptions in words and figures as follows, to wit:

138 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES
vs.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, Limited. } No. 1069.

On the trial of this cause the plaintiff offered in evidence a resolution of the board of directors of the Oregon and Washington Trust Investment Company, Limited, of date December 17, 1875, in terms following:

"Attorneyship.—The directors, having in view the recommendation of the local board, resolved and hereby resolve to appoint Mr. Ellis G. Hughes as the local agent of the company, this appointment to subsist during the pleasure of the Dundee board."

And a letter of the secretary of the same company, of date December 18th, 1875, with which said resolution was transmitted to plaintiff, in terms following:

"DUNDEE, 18*th Dec.*, 1875.

"Ellis G. Hughes, Esq., attorney, Portland, Oregon.

"DEAR SIR: Refer-ing to your letters of 1st and 13th October, I have now the pleasure to annex extract from the minutes of a meeting of my directors, held yesterday, from which you will see that they have appointed you to the very responsible post of law agent for the company in Portland, Oregon.

"I do not at this time require to enlarge upon the duties required from you in this position, as you already have had some con-
139 siderable experience of them. It may be well, however, to remind you of what you no doubt have very clearly in view, viz., that in all cases the company has a clear & indisputable first mortgage to the subjects pledged in security, and that the company's business is conducted in accordance with the laws of the State of Oregon, the Territory of Washington, and the United States of America are matters for which you are personally responsible to my directors and the company.

"Accept my congratulations upon this appointment, and believe me to be,

"Yours truly, WILLIAM MACKENZIE, *Sec'y.*"

Together with certain printed rules furnished plaintiff at the time of his appointment, in terms following:

"Attorney-at-law.

"It shall be the duty of the company's attorney or attorneys—

"(A) To prepare all mortgages, deeds, notes, coupons, and other documents in connection with the company's loans and to be responsible for their due execution, publication, registration, and validity.

"(B) To be responsible that all mortgages taken are a clear and indisputable first lien upon the subjects mortgaged and to grant certificates to that effect.

"(C) To take charge of and conduct such proceedings as may from time to time be instituted by the company or in which the company may be interested, subject to such instructions as may be issued thereanent.

140 "(D) To advise the local board and the directors of any point of legal or other interest to the company which may be developed or come under his or their notice from time to time by legislature or judicial action or otherwise.

"(E) And generally to give his or their best attention to all matters connected with the legal department of the company's business, and to give such information or advice as may from time to time be requested or occur to him or them."

And it being thereupon stipulated and agreed that on the defendant succeeding to the business of the Oregon and Washington Trust Investment Company, Limited, that the plaintiff became the attorney of the defendant on the same terms as he had been attorney of said company, the plaintiff, having proven the issuance of the cer-

tificates sued on and introduced testimony as to the value of the service rendered and responsibility assumed in issuing the same, rested his case.

Whereupon, it being then admitted in open court that Addison C. Gibbs had been the attorney of the Oregon and Washington Trust Investment Company, Limited, prior to the appointment of the plaintiff as such; that plaintiff had been the partner of said Gibbs and had taken his appointment on the same terms as Gibbs had held his, save only as it might be varied by the resolution, the letter of the secretary, and the printed rules offered in evidence by the plaintiff, the defendant offered in evidence a letter which, it was admitted, contained the terms of the appointment of Mr. Gibbs, and which is in terms following:

141 "DUNDEE, 22*d August*, 1874.

"DEAR SIR: The directors of the Oregon and Washington Trust Investment Company, Limited, have had under consideration a recommendation to appoint you as law agent in and concerning the preparation of mortgages for loans authorized by them in America, and I have now the pleasure of informing you that they have appointed you as law agent on the following footing:

"1. You shall do all work and carry thro' all procedure and see to the execution and registration and publication of deeds requisite and necessary for giving and securing to the company valid and effectual first and preferable mortgages over real estate for such loans as the directors at Dundee may from time to time sanction and authorize.

"2d. In the performance of your duties as law agent aforesaid you will have regard to the amended rules made by the directors, of which a copy is hereunto annexed.

"3. You shall not directly nor indirectly take or receive for behoof of the company any commission, bonus, or other benefit from a borrower, and the company shall not covenant for or accept in respect of any loan anything but the interest conditioned to be paid in and by the mortgage, and which interest shall never exceed what is lawful and right.

"4. You shall not, by yourself or any or either of your partners, be or act as local directors of the company, and you shall not, directly nor indirectly, be interested in any property mortgaged or proposed to be mortgaged to the company or be in copartnery or joint adventure or otherwise connected with any borrower.

142 "5. Your professional fees against borrowers, including abstracts, searches, investigating titles, preparation and recording of mortgages, shall in no case exceed what the laws of the State warrant, and, although the law might warrant and allow more, shall never exceed what follows:

"Scale of maximum fees to be charged borrowers by law agent.

"For loans under $2,001, 3½ per cent. (exclusive of traveling and hotel bills); for loans under $4,001 and above $2,000, 3 per cent. (ex-

clusive of ditto); for loans above $4,000 and under $20,000, 2½ per cent. (do. do.).

"6. You shall be responsible to the company for the validity and sufficiency of all mortgages prepared or taken by you.

"7. I commend to your attention a letter which I have to-day written to Mr. Reid defining his duties as manager of the company at Portland, and both you and he will be pleased to understand that that appointment, according to the terms of that letter, and your appointment, according to the terms of this letter, are made upon the footing that the said appointments and terms thereof are lawful and right according to the laws of the States or countries in which the real estates upon which the company's loans may be made are situated and according to the laws of the United States, and nothing shall be done by you or Mr. Reid, directly or indirectly, either in your own names or for your own behoof or in the name or for behoof of the company, to prejudice or affect or imperile in any way the validity and sufficiency of any mortgage granted or to be granted to the company, or to create or give rise to any claim, penalty tax, or other exaction, or loss to the company.

143 "8. Your appointment is, of course, at the pleasure of the company.

"Yours faithfully, WALTER BAXTER,
"*Interim Secretary.*

"Addison C. Gibbs, Portland, Oregon."

And also parts of a letter written by the plaintiff to John Leng, one of the directors of the Oregon and Washington Trust Investment Company, Limited, of date the 30th day of September, 1876. The parts offered in evidence being in terms following:

"SEPTEMBER 30TH, 1876.

"John Leng, Esq., a director of the Oregon and Washington T. I. Co., L., Chicago, Ills.

"DEAR SIR: Press of business prevented my writing you on Thursday last, as I had intended. I therefore thought best to address my letter to you at Chicago instead of San Francisco. Kindly excuse the unavoidable delay.

"To take up separately the different subjects upon which you requested an expression of my views."

* * * * * * * *

"Attorneys' fees.

"The fees which are now charged upon each loan as the fees of the attorney for the examination of titles, and of which one-half of one per cent. on the entire amount of the loan is now paid to Mr. Reid, is a scale of fees based upon the minimum charges made by respectable and responsible attorneys here for the same service and responsibility. I have always felt that it was an injustice to the

144 attorney to require any part of these fees to be paid to the company's manager. The division was acceded to at the

time when established under the belief that if the company's expenses were kept down until it had been demonstrated that its business in Oregon would be profitable that the hon. directors would then feel desposed to make such allowance for the pay of its manager, &c., as to give to each one employed in the co'y's service ample compensation for services rendered. The business of the company is now in such a prosperous condition as, I think, entitles me to ask that I be allowed to receive for my services in their behalf at least the minimum fees charged for like services by gentlemen in equal "standing in my profession here, which would be the entire fees now charged borrowers and out of which there is now paid Mr. Reid one-half of one per cent. on the entire amount of the loan. It would be no object to, but, in fact, a lose for, me to continue to act in future as the attorney of the company if the fees actually received by me are to continue as at present."

* * * * * * *

"On the matter of attorneys' fees it has been for some time past my intention to express my views, but as a visit from one or more of the directors was anticipated I concluded to let the matter rest until, being present, they could ascertain for themselves the truth or falsity of my statements, which, as I spoke to you of the matter when here, I presume you have done.

"Very respectfully, your ob'd't serv't,

"ELLIS G. HUGHES."

And a resolution of the Oregon and Washington Trust Investment Company, Limited, of date November 23d, 1876, in terms following:

"Attorney.—That Mr. Hughes, the company's attorney, be
145 remunerated by fees charged borrowers in terms of scale of March, 1875, and now current. The directors trust that these rates of remuneration, which, along with the relative appointment, are to continue during their pleasure, will be satisfactory to all concerned."

And, having introduced other testimony as to the value of the service of issuing the certificates sued on, the defendant, without offering any other testimony as to the terms of the contract with the plaintiff, rested its case.

Whereupon the plaintiff, for the purpose of showing the meaning and intent of the resolution of November 23d, 1876, offered in evidence by the defendant, offered in evidence a letter of John Leng, of November 24th, 1876, in terms following:

"113 PANMURE STREET, DUNDEE, 24*th Nov.*, 1876.

"E. G. Hughes, Esq., Portland.

"DEAR SIR: My colleagues have cordially adopted my recommendation that you receive your fees according to the scale now subsisting, without any deduction. This will take effect 1st January & I hope will be quite satisfactory to you.

"I learned in the Eastern States that the mortgage form of one large lending company provides that the expenses paid to the attorney in the event of foreclosure shall be such sum as the court may consider reasonable or a reasonable sum. They say the borrower never objects to this and the attorney is always allowed what satisfies him. Would it not be well for you to adopt this?

"I am, dear sir, yours faithfully,

"JOHN LENG."

146 And the plaintiff, having proven that the resolution of November 23d, 1876, offered in evidence by the defendant, was transmitted to him with said letters, without offering any other testimony as to the terms of the contract between himself and the Oregon and Washington Trust Investment Company, Limited, rested his case, and the taking of testimony was closed, and no other testimony as to the terms of the contract with the plaintiff, save that herein set out, was taken by either party.

Whereupon the court charged the jury as follows:

147 It appears from the evidence in this case that in 1874 Mr. Gibbs was appointed the attorney of this company, and that shortly after he took Mr. Hughes into partnership with him. This appointment to the attorneyship of this company is evidenced by a letter which is called the "Baxter letter," and it is claimed by the plaintiff that it constitutes the contract under which he performed this service, and measures his duty and the company's liability. Taking that to be the fact, I proceed to consider what the contract, as evidenced by this letter, amounts to. It may be well to say that in some respects this contract was varied afterward by the parties. The company reserved the right always to discharge its attorney or change his compensation.

There was no permanent employment, and if he did not like the terms he could quit.

The first clause in this letter provides: "You shall do all work and carry through all procedure and see to the execution and registration and publication of all deeds requisite and necessary for giving and securing to the company valid and effectual first and preferable mortgages over real estates for such loans as the directors at Dundee may from time to time sanction and authorize."

These are the duties which this attorney was to perform. The language is the language of people in a foreign country, who are not absolutely familiar with our procedure and the vocabulary of our courts and laws. The principal duty which the plaintiff was required to attend to was to see that the company got first, valid and effectual mortgages. This was the duty that he was employed to perform, to see that the company got first and preferable mortgages.

148 Then he was instructed in the third clause that he must take no commission or compensation for the company, that the loan might not be deemed usurious. He was directed that he must not himself nor his partner be a local director in the company nor be directly or indirectly interested in any property mortgaged

or proposed to be mortgaged to the company or be in copartnery or joint adventure or otherwise connected with any borrower.

Then comes the fifth clause, on which the counsel for plaintiff rests his case: "Your professional fees against borrowers, including abstracts, searches, investigating titles, preparation and recording of mortgages, shall in no case exceed what the laws of the State warrant, and, although the laws might warrant and allow more, shall never exceed what follows." Then follows a schedule of maximum fees.

Then follows the sixth clause: "You shall be responsible to the company for the validity and sufficiency of all mortgages prepared or taken by you."

Counsel for plaintiff, as stated, rest- his case mainly on this fifth subdivision of this letter or contract and because it does not contain the words "certificate of title" claim- that, although the plaintiff was bound for his professional fees received from borrowers to make abstracts and searches, he was not required to do the particular thing called giving the certificate of title, and therefore his doing so, as he did it, was something for which he was not compensated.

I think this is a narrow, unreasonable, and unjust construction of this clause and of the whole letter. He had some relations with this company. He had to inform this company in some way that the proposed mortgage was a good or a bad one; that the
149 parties had a good or a bad title, and see that the mortgage was properly executed. He had in some way to say to the company that it had obtained valid and effectual lien as security for its money. How he should do so was not so important as that he should do so.

Some time in 1875, the fall of 1875, Mr. Gibbs went out of this employment and Mr. Hughes succeeded in the business, Mr. Hughes having himself been Gibbs' partner. He says that he did not know that this letter (Baxter letter) had been received, but claims that the contract between himself and the company was that he was entitled to the same compensation that Mr. Gibbs had received. It seems that in March, 1875, there was a new schedule of fees arranged between Mr. Gibbs and Mr. Reid, the manager of the defendant. A loan of $500 paid $10, and so on. It seems that Mr. Reid took upon himself to perform some of this duty and claimed one-half of one per cent. of the compensation as his own. Mr. Hughes was dissatisfied. He wrote a letter to the managers of the defendant, whereupon a resolution was passed declaring what his remuneration should be. It is in these words:

"Attorney.—That Mr. Hughes, the company's attorney, be remunerated by fees charged to borrowers in terms of scale of March, 1875, and now current. The directors trust that these rates of remuneration, which, along with the relative appointment, are to continue during their pleasure, will be satisfactory to all concerned."

This was received by the plaintiff and acted upon by him. It is a part of the contract between the parties, the alteration of the contract made by the parties to it. In my judgment the plaintiff
150 was to be fully compensated for all the services he performed

in and about the mortgages taken by the defendant by the prescribed fees received from the borrowers.

Now, it is not necessary to determine what is the effect of this certificate; but something must be said about it. By way of magnifying the value of his service, the plaintiff claims that it is an absolute warranty; that this young man undertook to guaranty absolutely the validity of the security for this million and a half of money. It might be a question what the guaranty is worth. His guaranty as a lawyer is all that I think he put into it. It reads that he certifies that the title to the property at the date of the record is absolute, in fee simple.

In a majority of instances there is no question about the title; the record contains the evidence. He does not warrant it beyond the statement that the title is good according to the record of deeds, and he is only responsible for ordinary skill and ability in that respect. For instance, there might be an error with the registry. The clerk may have recorded the mortgage under the head of deeds. The purport and effect of this certificate is simply this: The plaintiff certifies to this conclusion, that the title to this property, as it appears by the record, is good.

There is no extraordinary responsibility assumed by Mr. Hughes at all. My conclusion is, then, that the plaintiff undertook to do this duty. It became necessary to inform the company, in some way agreed upon between them, that a mortgage was a valid security for a loan—that the title was good—and the mode of doing so was a matter of agreement between them. He simply gave his judgement to them, and this as a necessary part of his duty, and therefore he is not entitled to recover any additional compensation for these services. On this conclusion, of course, your

151 verdict must be for the defendant.

I am asked by counsel for plaintiff to submit a question to you specially, one which I had thought of before and now submit to you. I want you to say specially what these services were worth, if anything, over and above what the plaintiff received from the borrowers. It appears from his own statement that he received $30,000 from the borrowers. Taking all the circumstances into consideration, you will find specially whether the services rendered by the plaintiff *was* worth more than what he received from the borrowers or not, and, if more, how much.

152 To which charge the plaintiff at the time duly excepted as follows:

To the construction given by the court to the terms of the contract made between him and the Oregon and Washington Trust Investment Company, Limited, by the writings offered in evidence, and the instruction that under the same he was bound to issue the certificates sued on for the fees received by him from borrowers, and that the jury should find for the defendant.

To the instruction given by the court for a special finding as to the value of the service of issuing the certificates, in that the plaintiff asked for a special finding as to such value as independent of any

payment, the claim of the plaintiff being that no payment whatever had been made thereon, and that the fees collected from the borrowers were to pay for other services, and in no part or manner to apply as pay for the certificates.

Inasmuch as the said several matters so given in evidence and in the instructions to the jury so by the plaintiff objected and excepted to as aforesaid do not appear by the record of the verdict in this cause and the plaintiff did then and there propose his aforesaid objections and exceptions to the opinion of the judge and request him to put his seal to this bill of exceptions containing the several matters excepted and objected to, I, Mathew P. Deady, judge of the above-entitled court and the judge before whom said cause was tried, at the request of the party objecting, have signed and put my seal to this bill of exceptions on this the 28th day of February, A. D. 1887.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

(Endorsed:) Filed February 28th, 1887. R. H. Lamson, clerk, by R. B. Lamson, deputy.

153 And afterwards, to wit, on the 28th day of December, 1886, there was duly filed in said court a bond on appeal in words and figures as follows, to wit:

154 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES
vs.
THE DUNDEE MORTGAGE AND TRUS- INVESTMENT COMPANY, Limited. } No. 1069.

Know all men by these presents that we, Ellis G. Hughes, P. W. Gillett, and J. W. Kern, are held and firmly bound unto The Dundee Mortgage and Trust Investment Company, Limited, in the sum of two hundred & fifty dollars, to be paid to the said The Dundee Mortgage and Trust Investment Company, Limited, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated December 18, 1886.

Whereas the above-named Ellis G. Hughes has taken a writ of error — the Supreme Court of the United States to reverse the judgment in the above-entitled cause by the circuit court of the United States for the district of Oregon:

Now, therefore, the condition of this obligation is such that if the above-named Ellis G. Hughes shall prosecute said writ of error to effect and answer all costs and damages if he shall fail to make

good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

ELLIS G. HUGHES. [L. S.]
J. W. KERN. [L. S.]
P. W. GILLETT. [L. S.]

Signed, sealed, and delivered in presence of—
HENRY WAGNER.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, J. W. Kern, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said district, and that I am worth, in property situated therein, the sum of two hundred & fifty dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

J. W. KERN.

Subscribed and sworn to before me this Dec. 18, 1886.
[SEAL.] HENRY WAGNER,
Notary Public for Oregon.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, P. W. Gillette, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said district, and that I am worth, in property situated therein, the sum of two hundred & fifty dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

P. W. GILLETT.

Subscribed and sworn to before me this Dec. 18, 1886.
HENRY WAGNER,
[SEAL.] *Notary Public for Oregon.*

Approved.

MATTHEW P. DEADY, *J.*

[Endorsed:] No. —. U. S. circuit court, district of Oregon. —— —— *vs.* —— ——. Bond. Filed Dec. 28, 1886. R. H. Lamson, clerk, by —— ——, deputy clerk.

155 In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, do hereby certify that the foregoing is a

true copy of the record and of all proceedings, including the opinions of the court, in the cause entitled Ellis G. Hughes *vs.* The Dundee Mortgage and Trust Investment Company, Limited, in said court determined.

Witness my hand and the seal of said court this September 26, 1887.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON, *Clerk.*

156 DISTRICT OF OREGON, *ss:*

I certify that on the 10th day of February, 1888, at Portland, Multnomah county, in said district, I duly served the within "statement of error," etc., upon the therein-named The Dundee Mortgage and Trust Investment Company, Limited, by delivering to E. C. Bronaugh, of the firm of Whalley, Bronaugh and Northup, attorneys for the said company, personally a true copy of said "statement of error," etc., duly certified to by me as U. S. marshal.

JOHN MYERS,
United States Marshal,
By CHAS. N. WAIT, *Deputy.*

157 In the Supreme Court of the United States.

ELLIS G. HUGHES, Plaintiff in Error,
vs.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, Limited. } No. 1317.

Error to the circuit court of the United States for the district of Oregon.

The defendant in error above named is hereby notified that, pursuant to the rule declared March 28, 1887, by the Supreme Court regulating the printing of records and transcripts in that court in the above-entitled cause, the plaintiff in error will rely upon the following errors in the record, to wit:

1. The court below erred at the trial of said cause in instructing the jury that under the contract contained in the letters and other writings introduced by both parties as containing and constituting the contract under which the plaintiff issued the certificates sued on, and which writings are set out in the bill of exceptions, the plaintiff was bound to issue such certificates for the fees received by him from borrowers, and that the jury should find for the defendant; to which instruction the plaintiff duly excepted, and the exception was allowed.

2. The court below erred at the trial of said cause in instructing the jury to make a special finding as to the value of the service of the plaintiff in issuing said certificates of title over and above the fees received from borrowers, there being no such question in the case under either the pleadings or evidence; to which instruction the plaintiff in error duly excepted, and the exception was allowed.

158 The defendant will further take notice that the plaintiff in error proposes to print and so designates the following portions of the record as sufficient to present the error relied on in this cause, to wit:

1, the complaint; 2, the last amended answer; 3, the reply to the last amended answer; 4, the bill of exceptions; 5, the final judgment entry.

J. N. DOLPH,
Counsel for Plaintiff in Error.

159 [Endorsed:] In the Supreme Court of the United States. Oct. term, 1887. No. 308. Ellis G. Hughes, plaintiff in error, *vs.* The Dundee Mortgage and Trust Investment Company, Limited. No. 1317. Statement of errors and designation by pl'ff in error of portions of the record to be printed. J. N. Dolph, counsel for plaintiff in error.

[Stamped:] Office Supreme Court U. S. Filed Feb. 21, 1888. James H. McKenney, clerk.

Endorsed on cover: Oregon C. C. U. S. No. 308. Ellis G. Hughes, plaintiff in error, *vs.* The Dundee Mortgage and Trust Investment Company, Limited. Filed November 28, 1887.

Office Supreme Court U. S.
FILED.
APR 10 1891
JAMES. H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 306.

ELLIS G. HUGHES, *Plaintiff in Error,*

vs.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED, *Defendant in Error.*

No. 307.

ELLIS G. HUGHES, *Plaintiff in Error,*

vs.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED, *Defendant in Error.*

No. 308.

ELLIS G. HUGHES, *Plaintiff in Error,*

vs.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED, *Defendant in Error.*

Brief and Argument for Plaintiff in Error.

J. N. DOLPH,
Attorney for Plaintiff in Error.

W. H. Moore & Co., Prints., 511 Eleventh St. N. W.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 306.

ELLIS G. HUGHES, *Plaintiff in Error,*

vs.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED, *Defendant in Error.*

No. 307.

ELLIS G. HUGHES, *Plaintiff in Error,*

vs.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED, *Defendant in Error.*

No. 308.

ELLIS G. HUGHES, *Plaintiff in Error,*

vs.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED, *Defendant in Error.*

Brief and Argument for Plaintiff in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Brief and Argument for Plaintiff in Error.

STATEMENT.

These actions were brought in the Circuit Court of the United States for the District of Oregon, by Ellis G. Hughes, plaintiff in error, a citizen of Oregon and an attorney-at-law, against the Dundee Mortgage and Trust Investment Company, Limited, alleged to be a corporation organized under the laws of Great Britain and Ireland, to recover compensation for legal services performed for the Oregon and Washington Trust Investment Company, Limited; the Oregon and Washington Mortgage Savings Bank, Limited, and the Dundee Mortgage and Trust Investment Company, Llimited, all foreign corporations. The first two of these corporations, it is alleged, were consolidated with last-named company after the services of the plaintiff were performed for them and all their property assigned to the last-named company, in consideration of which said last-named company, the defendant in error, assumed and agreed to pay all the indebtedness of said first two companies, including their indebtedness to plaintiff.

The services alleged to have been performed by the plaintiff for the several companies were similar in character in all the cases, and consisted in issuing to the several companies, respectively, certificates of title to real estate, upon which said companies took mortgage liens to secure payment of loans.

No. 306 is an action to recover for such services rendered the Oregon and Washington Trust Investment Company, Limited, from January 1, 1875, to January 1, 1880.

No. 307 is an action to recover for such services rendered the Oregon and Washington Mortgage Savings Bank, Limited, from August, 1876, to January 1, 1882.

No. 308 is an action to recover for services performed for the defendant in error.

The pleadings are substantially alike in all the cases, and the bills of exceptions and questions for consideration in this court are the same, with the exception that in No. 307 the only evidence offered by the defendant to prove the special contract set up in the answer was the Baxter letter.

A statement of the issues made by the pleadings in the first case in order will, therefore, be sufficent for all the cases.

THE COMPLAINT.

It is alleged in substance in the complaint in No. 306, that plaintiff is a citizen of Oregon, and defendant a corporation under the laws of Great Britain and Ireland, lawfully engaged in business in the State of Oregon.

That the Oregon and Washington Trust Investment Company, Limited, was continuously, from January 1, 1875, to January 1, 1880, a corporation, organized under the laws of the United Kingdom of Great Britain and Ireland, and during all said time was lawfully carrying on business in Oregon and Washington through an office in the City of Portland, Oregon.

That the business of said company during said period was, among other things, loaning money in Oregon and Washington; that during all said period plaintiff was an

attorney-at-law, and did, at the special instance and request of said company and for its benefit, make and issue to it in writing five hundred and fifty-four separate certificates of title upon a like number of loans made by said company, wherein and whereby he did, to the extent specified in each of said certificates, become responsible to said corporation that the title to the real estate upon which it took mortgage liens to secure the repayment of its loans was absolute in fee simple in the party or parties making the mortgages thereon in favor of said company, and free from all manner of liens and incumbrances, and that the mortgage made to said company was a first lien.

That said company undertook and agreed to pay plaintiff the reasonable value of such service and the liability assumed in issuing such certificates, which reasonable value was one per cent. upon the amount of each loan, and $11,222.74 in the aggregate, for which sum of $11,222.75 said company was indebted to said plaintiff on the 31st day of January, 1880, at which date said company amalgamated with the defendant corporation, the Dundee Mortgage and Trust Investment Company, Limited, and assigned to it all its property and assets in consideration of which the defendant agreed to pay all the debts of said Oregon and Washington Trust Investment Company, including its indebtedness to plaintiff. That no part of said sum has been paid and there is justly due and owing from the defendant to the plaintiff, principal and interest, the sum of $15,350.19. (See Record No. 306, folios 5, 6, 7 and 8, pp. 3 and 4.)

THE ANSWER.

The citizenship of the plaintiff, the incorporation of the defendant, the absorption by the defendant of the Oregon

and Washington Trust Investment Company, Limited, and the assumption by the defendant corporation of the debts of that company are not denied.

The issuing of the certificates *at the instance and request of the Oregon and Washington Trust Investment Company Limited*, the alleged agreement of that company to pay plaintiff the reasonable value thereof, the allegations as to the value of the services and that the defendant assumed or agreed to pay said alleged indebtedness of the Oregon Trust Investment Company to plaintiff, are denied in the last amended answer. (See Record No. 306, folios 65 and 66, pp. 5 and 6.)

Several special defenses are pleaded, none of which are material to the questions to be considered in this court except the following, to wit:

"And defendant, for another defense to the cause of action set forth in the complaint alleges that said Oregon and Washington Trust Investment Company, during the period set forth in the complaint, being engaged in the State of Oregon and Washington Territory in the loaning of money for interest, taking as security for the repayment thereof, principal and interest, first mortgage liens on real estate situated in said State and Territory, did agree with the plaintiff as follows: That said company being able to control a large and profitable business in the certification of titles submitted to it as mortgage securities for loans, said plaintiff, in consideration of being appointed attorney for the said company, with the right to charge fees to borrowers on a scale of fees fixed by said company, undertook, among other things, to issue his certificates of title to said company, guaranteeing the title to such real estate to be in fee simple and unencumbered in the borrower, and that the mortgage lien to be taken by said company was the first lien and encumbrance on such real estate, and that his renumeration for such service and responsibility should be the fees so charged and recovered from said borrowers as aforesaid, and that he should make no charge for the making or issuing of said certificates of

title or any of them against said company, but should look solely to the fees from said borrowers for his remuneration; and defendant alleges that all of said certificates of title mentioned in the complaint were made and issued under and in pursuance of the aforesaid agreement and at the instance and request of the respective borrowers and were accepted by said company on the aforesaid condition that said company should incur no liability to the plaintiff therefor, but that all compensation for such service and liability therefor shall be borne by said respective borrowers." (See Record No. 306, folios 68 and 69, p. 7.)

This defense, with the other new matter set up in the answer, was denied by the plaintiff in his reply.

Upon the issues joined the parties proceeded to trial, and the plaintiff to maintain the allegations of his complaint.

(I quote from the bill of exceptions:)

"Offered in evidence a resolution of the board of directors of the Oregon and Washington Trust Investment Company, Limited, of date December 17, 1875, in terms following:

"Attorneyship.—The directors, having in view the re-
"commendation of the local board, resolved and hereby
"resolve to appoint Mr. Ellis G. Hughes as the local agent
"of the company, this appointment to subsist during the
"pleasure of the Dundee board."

"And a letter of the secretary of the same company, of date December 18, 1875, with which said resolution was transmitted to plaintiff, in terms following:

DUNDEE, 18*th Dec.*, 1875.

"Ellis G. Hughes, Esq., attorney, Portland, Oregon.

"DEAR SIR: Referring to your letter of 1st and 13th
"Oct., I have now the pleasure to annex extract from the
"minutes of a meeting of my directors, held yesterday,
"from which you will see that they have appointed you
"to the very responsible — of law agent for the company
"in Portland, Oregon.

150 "I do not at this time require to enlarge upon "the duties required from you in this position, as "you already have had some considerable experience of "them. It may be well, however, to remind you of what "you no doubt have very clearly in view, viz., that in all "cases the company has a clear and indisputable first "mortgage to the subjects pledged in security, and that "the company's business is conducted in accordance with "the laws of the State of Oregon, the Territory of Wash-"ington, and the United States of America are matters for "which you are personally responsible to my directors and "the company.

"Accept my congratulations upon this appointment, "and believe me to be

"Yours truly,

WILLIAM MACKENZIE, *Sec'y.*"

"Together with certain printed rules furnished plaintiff at the time of his appointment, in terms following:

"ATTORNEY-AT-LAW.

"It shall be the duty of the company's attorney or at-"torneys—

"(A) To prepare all mortgages, deeds, notes, coupons, "and other documents in connection with the company's "loans, and to be responsible for their due execution, pub-"lication, registration, and validity.

"(B) To be responsible that all mortagages taken are a "clear and indisputable first lien upon the subjects mort-"gaged, and to grant certificates to that effect.

"(C) To take charge of and to conduct such proceedings "as may from time to time be instituted by the com-
151 "pany or in which the company may be interested, "subject to such instructions as may be issued "thereanent.

"(D) To advise the local board and the directors of any "point of legal or other interest to the company which "may be developed or come under his or their notice from "time to time by legislative or judicial action or other- "wise.

"(E) And generally to give his or their best attention "to all matters connected with the legal department of the "company's business, and to give such information or ad- "vice as may from time to time be requested or occur to "him or them.

"And having proven the issuance of the certificates sued "on and introduced testimony as to the value of the ser- "vice rendered and responsibility assumed in issuing the "same, rested his case." (See Record No. 306, folios 149, 150 and 151, pp. 16 and 17.)

The plaintiff had proved his employment, the rendition of the services alleged in the complaint and their value, and upon the case made was entitled to recover.

The defendant then undertook to maintain the defense, set up in its answer, in substance, that the services for which the plaintiff sought to recover were performed under an agreement by which the compensation for them was to be paid entirely by the borrowers, and that he should make no charge for the same against the company for which they were performed.

The case made by the defendant is stated in the bill of exceptions as follows:

"Whereupon, it being then admitted in open court that Addison C. Gibbs had been the attorney of the said Oregon and Washington Trust Investment Company, Limited, prior to the appointment of the plaintiff as such, that plaintiff had been the partner of said Gibbs and had taken his appointment on the same terms as Gibbs had held his, save only in so far as it might be varied by the written resolution, the letter of the secretary, and the printed rules

offered in evidence by the plaintiff, the defendant offered in evidence a letter which, it was admitted, contained the terms of the appointment of Mr. Gibbs, and which is in terms following:

"DUNDEE, 22*d August*, 1874.

"DEAR SIR: The directors of the Oregon and Washington Trust Investment Company, Limited, have had under consideration a recommendation to appoint you
152 as law agent in and concerning the preparation of mortgages for loans authorized by them in America, and I have now the pleasure of informing you that they have appointed you as law agent on the following footing:

"1. You shall do all work and carry thro' all procedure and see to the execution and registration and publication of deeds requisite and necessary for giving and securing to the company valid and effectual first and preferable mortgages over real estate for such loans as the directors at Dundee may from time to time sanction and authorize.

"2. In the performance of your duties as law agent aforesaid, you shall have regard to the amended rules made by the directors, of which a copy is hereunto annexed.

"3. You shall not directly nor indirectly take or receive for behoof of the company any commission, bonus or other benefit from a borrower, and the company shall not covenant for or accept in respect of any loan anything but the interest conditioned to be paid in and by the mortgage, and which interest shall never exceed what is lawful and right.

"4. You shall not, by yourself or any or either of your partners, be or act as local directors of the company, and you shall not, directly or indirectly, be interested in any property mortgaged or proposed to be mortgaged to the company or be in copartnery or joint adventure or otherwise connected with any borrower.

"5. Your professional fees *against borrowers*, including abstract searches, investigating titles, preparation and recording of mortgages, shall in no case exceed what the law of the State warrant, and, although the law might warrant and allow more, shall never exceed what follows:

"Scale of maximum fees to be charged borrowers by law agent.

153 "For loans under $2,001, 3½ per cent. (exclusive of traveling and hotel bills); for loans under $4,001 and above $2,000, 3 per cent. (exclusive of ditto); for loans above $4,000 and under $20,000, 2½ per cent. (do. do.).

"6. You shall be responsible to the company for the validity and sufficiency of all mortgages prepared or taken by you.

"7. I commend to your attention a letter which I have to-day written to Mr. Ried defining his duties as manager of the company at Portland, and both you and he will be pleased to understand that that appointment, according to the terms of that letter, and your appointment, according to the terms of this letter, are made upon the footing that the said appointments and terms thereof are lawful and right according to the laws of the States or countries in which the real estates upon which the company's loans may be made are situated and according to the laws of the United States, and nothing shall be done by you or Mr. Reid, directly or indirectly, either in your own names or for your own behoof or in the name or for behoof of the company, to prejudice or affect or imperil in any way the validity and sufficiency of any mortgage granted or to be granted to the company, or to create or give rise to any claim, penalty tax, or other exaction, or loss to the company.

"8. Your appointment is, of course, at the pleasure of the company.

"Yours faithfully,

"WALTER BAXTER,
"*Interim Secretary.*

"ADDISON C. GIBBS, *Portland, Oregon.*"

"And also parts of a letter written by the plaintiff to John Leng, one of the directors of the Oregon and

154 Washington Trust Investment Company, Limited, of date the 30th day of September, 1876.

"The parts offered in evidence being in the terms following:

"SEPTEMBER 30, 1876.

"JOHN LENG, Esq., a director of the Oregon and Washington Trust Investment Company, Limited, Chicago, Ills.:

"DEAR SIR: Press of business prevented my writing you on Thursday last, as I had intended. I, therefore, thought best to address my letter to you at Chicago instead of San Francisco. Kindly excuse the unavoidable delay.

"To take up separately the different subjects upon which you requested an expression of my views."

* * * * * * *

ATTORNEYS' FEES.

"The fees now charged upon each loan as the fees of the attorney for the examination of titles, and of which one-half of one per cent. on the entire amount of the loan is now paid to Mr. Reid, is a scale of fees based upon the minimum charges made by respectable and responsible attorneys here for the same service and responsibility. I have always felt that it was an injustice to the attorney to require any part of these fees to be paid to the company's manager. The division was acceded to at the time when established under the belief that if the company's expenses were kept down until it was demonstrated that its business in Oregon would be profitable that the honorable directors would then feel disposed to make such allowance for the pay of its manager, etc., as to give to each one employed in the company's service ample compensation for services rendered. The business of the company is now in such a prosperous condition as, I think, entitles me to ask that I be allowed to receive for my services in their behalf at least the minimum fees charged for like services by gentlemen in equal standing in my profession here, which would be the entire fees now charged borrowers and out of which there is now paid Mr. Ried one-half of one per cent. on the entire amount of the loan. It would be no object to, but, in fact, a loss, for me to continue to act as the attorney of the company if the fees actually received by me are to continue as at present.

* * * * * * *

"On the matter of attorneys' fees it has been for some time past my intention to express my views, but as a visit from one or more of the directors was anticipated I concluded to let the matter rest until, being present, they could ascertain for themselves the truth or falsity of my statements, which, as I spoke to you of the matter when here, I presume you have done."

Very respectfully, your obedient servant,
ELLIS G. HUGHES.

"And a resolution of the Oregon and Washington Trust Investment Company, Limited, of date November 23, 1876, in terms following:

"Attorney.—That Mr. Hughes, the company's attorney, be remunerated by fees charged borrowers in terms of scale of March, 1875, and now current. The directors trust that these rates of remuneration, which, along with the relative appointment, are to continue during their pleasure, will be satisfactory to all concerned." (See Record No. 306, folios 151 to 155 inclusive, pp. 18, 19 and 20.)

"And having introduced other testimony as to the value of the service of issuing the certificates sued on, the defendant, without offering any other testimony as to the
156 terms of the contract with the plaintiff, rested its case."

The plaintiff then in rebuttal (quoting again from the bill of exceptions) "for the purpose of showing the meaning and intent of the resolution of November 23, 1876, offered in evidence by the defendant, offered in evidence a letter of John Leng, of November 24, 1876, in terms following:)

"113 PANMURE ST., DUNDEE, *Nov.* 24, 1876.

"E. G. HUGHES, ESQ., *Portland.*

"DEAR SIR: My colleagues have cordially adopted my "recommendation that you receive your fees according to "the scale now subsisting, without any deduction. This "will take effect January 1st, and I hope will be quite "satisfactory to you.

"I learned in the Eastern States that the mortgage form "of one large lending company provides that the expenses "paid to the attorney in the event of foreclosure shall be "such sum as the court may consider reasonable or a "reasonable sum. They say the borrower never objects to "this, and the attorney is always allowed what satisfies "him. Would it not be well for you to adopt this?

"I am, dear sir, yours faithfully,

"JOHN LENG."

"And the plaintiff having proven that the resolution of November 23, 1876, offered in evidence by the defendant, was transmitted to him with said letter, without offering any other testimony as to the terms of the contract between himself and the Oregon and Washington Trust Investment Company, Limited, rested his case, and the taking of testimony was closed, and no other testimony
157 was offered by either party as to the terms of the contract between the plaintiff and said company." (See Record No. 306, folio 156, p. 20.)

The court thereupon charged the jury, in substance, that by the contract between the plaintiff and the company for which he performed the services set forth in the complaint he was bound for his professional fees received from borrowers for making abstracts and searches, to issue to the company the certificate mentioned in the complaint without charge to the company, and that, therefore, their verdict should be for the defendant.

The court also directed the jury to find specially what the services were worth over and above what the plaintiff received from the borrowers.

To which charge and direction the plaintiff excepted, and the exceptions were allowed. (See Record No. 306, folios 158 to 163 inclusive, pp. 21, 22 and 23.)

ASSIGNMENT OF ERRORS.

First. The court below erred at the trial of each cause in instructing the jury, that, under the contract contained in the letters and other writings introduced by both parties, as containing and constituting the contract under which plaintiff issued the certificates sued on, and which writings are set out in the bill of exceptions, the plaintiff was bound to issue such certificates for fees received by him from borrowers, and that the jury should find for the defendant, which instructions were in the following words, to wit:

"Then comes the fifth clause (of the Baxter letter) on which the counsel for plaintiff rests his case: 'Your professional fees against borrowers, including abstracts, searches, investigating titles, preparation and recording of mortgages, shall in no case exceed what the laws of the State warrant, and, although the laws might warrant and allow more, shall never exceed what follows.' Then follows a schedule of maximum fees.

Then follows the sixth clause: 'You shall be responsible to the company for the validity and sufficiency of all mortgages prepared or taken by you.'

Counsel for plaintiff, as stated, rests his case mainly on this fifth subdivision of this letter or contract and because it does not contain the words 'certificate of title' claims that, although the plaintiff was bound for his professional fees received from borrowers to make abstracts and searches, he was not required to do the particular thing called giving the certificate of title, and, therefore, his doing so, as he did it, was something for which he was not compensated.

I think that is a narrow, unreasonable and unjust construction of this clause and of the whole letter. He had some relations with this company. He had to inform this company in some way that the proposed mortgage
160 was a good or bad one; that the parties had a good or a bad title, and see that the mortgage was properly executed. He had in some way to say to the company that it had obtained valid and effectual lien as secur-

ity for its money. How he should do so was not so important as that he should do so.

Some time in 1875, the fall of 1875, Mr. Gibbs went out of this employment and Mr. Hughes succeeded in the business, Mr. Hughes having himself been Gibbs' partner. He says that he did not know that this letter (Baxter letter) had been received, but claims that the contract between himself and the company was that he was entitled to the same compensation that Mr. Gibbs had received. It seems that in March, 1875, there was a new schedule of fees arranged between Mr. Gibbs and Mr. Reid, the manager of the defendant. A loan of $500 paid $10, and so on. It seems that Mr. Reid took upon himself to perform some of this duty and claimed one-half of one per cent. of the compensation as his own. Mr. Hughes was dissatisfied. He wrote a letter to the managers of the defendant, whereupon a resolution was passed declaring what his remuneration should be. It is in these words:

'Attorney.—That Mr. Hughes, the company's attorney, be remunerated by fees charged to borrowers in terms of scale of March, 1875, and now current. The directors trust that these rates of remuneration, which, along with the relative appointment, are to continue during their pleasure will be satisfactory to all concerned.'

This was received by the plaintiff and acted upon by him. It is a part of the contract between the parties, the alteration of the contract made by the parties to it. In my judgment the plaintiff was to be fully compen-
161 sated for all the services he performed in and about the mortgages taken by the defendant by the prescribed fees received from the borrowers.

Now, it is not necessary to determine what is the effect of this certificate; but something must be said about it. By way of magnifying the value of his services, the plaintiff claims that it is an absolute warranty; that this young man undertook to guaranty absolutely the validity of the security for this million and a half of money. It might be a question what the guaranty is worth. His guaranty as a lawyer is all that I think he put into it. It reads that he certifies that the title to the property at the date of the record is absolute, in fee simple.

In a majority of instances there is no question about the title; the record contains the evidence. He does not warrant it beyond the statement that the title is good according to the record of deeds, and he is only responsible for ordinary skill and ability in that respect. For instance, there might be an error with the registry. The clerk may have recorded the mortgage under the head of deeds. The purport and effect of this certificate is simply this: The plaintiff certifies to this conclusion, that the title to this property, as it appears by the record, is good.

There is no extraordinary responsibility assumed by Mr. Hughes at all. My conclusion is, then, that the plaintiff undertook to do this duty. It became necessary to inform the company, in some way agreed upon between them, that a mortgage was a valid security for a loan—that the title was good—and the mode of doing so was a matter of agreement between them. He simply gave his judgment to them, and this as a necessary part of his duty, and, therefore, he is not entitled to recover any additional compensation for these services. On this con-
162 clusion, of course, your verdict must be for the defendant."

Second. The court below erred at the trial of each cause in directing the jury to make a special finding as to the value of the services of plaintiff in issuing said certificates of title, over and above the fees received from borrowers, which direction was in the words following, to wit:

"I am asked by counsel for plaintiff to submit a question to you specially, one which I had thought of before and now submit to you. I want you to say specially what these services were worth, if anything, over and above what the plaintiff received from the borrowers. It appears from his own statement that he received $30,000 from the borrowers. Taking all the circumstances into consideration, you will find specially whether the services rendered by the plaintiff was worth more than what he received from the borrowers or not, and, if more how much."

Because there was no such question as that submitted in either case, under either the pleadings or evidence, and the direction given was not the direction asked for by the plaintiff.

ARGUMENT.

I.

The direction to the jury to find what the services were worth over and above the amounts paid by borrowers was a palpable error, as there was no issue upon that subject, no such question involved in the case, and no testimony relating to the point.

II.

The instruction of the court to the jury as to the meaning and legal effect of the writings introduced to maintain the allegations of the answer as to a special contract that plaintiff should perform the services set out in his complaint for the fees charged against borrowers was erroneous.

When the plaintiff had proved his appointment as attorney for the companies, the rendition of the services at their request, and their value, his case was made out, there was an implied argument on the part of the companies receiving the services to pay him their reasonable values and he was entitled to recover, unless an agreement was proved that such services were to be performed without compensation, or for an agreed compensation. The burden of proof was upon the defendant to show such an agreement.

The defendant was the successor of the other two foreign corporations for which plaintiff performed services, it was controlled by the same parties who controlled them, and must be presumed if such a contract was made, to have had the means at its command to make the fullest and most satisfactory proof of it.

The alleged contract was an extraordinary one.

Prior to the passage of the resolution of the Oregon and

Washington Trust Investment Company of November 23, 1876, one-half of one per cent. upon the entire amount of loans made by the company—one-half the amount claimed by the plaintiff as the value of his services and responsibility for issuing the certificates in question—was deducted from the amount of fees plaintiff was allowed to collect from borrowers and paid to Mr. Reid, the companies' manager, and yet it is claimed that this foreign corporation which was loaning millions of dollars at the high rates of interest then prevailing in Oregon and Washington, had not only the right to fix the rates of fees to be charged against borrowers by the plaintiff, but to demand and receive his services without compensation, and to hold him as an insurer or guarantor—personally responsible—that all mortgages were clear and indisputable first liens upon the property mortgaged, and that the companies business was conducted in accordance with the laws of Oregon, Washington, and the United States.

The learned judge who tried this case in the court below instructed the jury that the responsibility to which plaintiff was held by the terms of his appointment was not greater than the law implies in similar services when there is no written contract fixing the measure of liability.

But this is clearly not the case. The rule as to liability of attorneys is stated in a late case as follows:

"A lawyer is not an insurer of the result in a case in which he is employed, *unless he makes a special contract to that effect and for that purpose;* nor is there any implied contract that he will bring to bear learning, skill, or ability beyond that of the average of his profession, nor can more than ordinary care and dilligence be required of him."

J. Willard Babbitt *vs.* Ann Bumpas, 73 Mich. R., 331.

In the case at bar the acceptance of employment by the plaintiff under the letter of the secretary of the company and the resolution of appointment and rules of the company constituted a special contract, that the plaintiff should become as to the matters for which he was to be held personally responsible, an insuror or guarantor, and this was a responsibility of a very different character from that which had been exacted of Gibbs as attorney of the company.

The Baxter letter is the evidence and the only evidence to show the contract between the Oregon and Washington Trust Investment Company and A. C. Gibbs, and the terms of plaintiff's employment, except as modified by the writings introduced by him, it being admitted in cases Nos. 306 and 307 that plaintiff took his appointment upon the same terms as Gibbs had held his, save only in so far as it might have been varied by the written resolution, the letter of the secretary, and the printed rules offered in evidence by the plaintiff, and in case No. 308, in substance, that after the amalgamation of the two old companies with the defendant, he continued as attorney of the defendant upon the same terms upon which he had been employed by the old companies.

The most casual comparison of the terms of the plaintiffs appointment, the duties required of him and the responsibility to which he was held, with the appointment of Gibbs, as evidenced by the Baxter letter, will show that they are widely dissimilar.

Gibbs was appointed as "law agent in and concerning "the preparation of mortgages for loans authorized by "them in America."

He was required to "carry thro' all procedure and see to the execution and registration and publication of deeds requisite and necessary for giving and securing to the

company valid and effectual first and preferable mortgages over real estate for such loans as the directors at Dundee 'might' from time to time sanction and authorize."

He was to "be responsible to the company for *the validity and sufficiency of all mortgages* prepared or taken by" him.

This was the full extent of his authority, duty, and responsibility. Compare this with the plaintiff's appointment.

In his letter of December 18th, 1875, transmitting to the plaintiff his appointment, Mr. Mackenzie, secretary of the Oregon and Washington Trust Investment Company, Limited, the company with which the contract for plaintiff's employment, which was adopted by the other companies was made, he says:

"*It may be well, however, to remind you of what you no doubt have very clearly in view, viz., that in all cases the company has a clear and indisputable first mortgage to the subjects pledged in security, and that the company's business is conducted in accordance with the laws of the State of Oregon, the Territory of Washington, and the United States of America are matters for which you are personally responsible to my directors and the company.*"

The duties required of the plaintiff as attorney of the company were specified in certain printed rules furnished him at the time of his appointment, which are broad enough to cover every possible legal service which could be required by a great corporation. These rules are set forth in the bill of exceptions and are as follows:

"ATTORNEY-AT-LAW.

"It shall be the duty of the company's attorney or attorneys—

"(A) To prepare all mortgages, deeds, notes, coupons, and other documents in connection with the company's loans and to be responsible for their due execution, publication, registration, and validity.

"(B) To be responsible that all mortgages taken are a clear and indisputable first lien upon the subjects mortgaged and to grant certificates to that effect.

"(C) To take charge of and conduct such proceedings as may from time to time be instituted by the company or in which the company may be interested, subject to such instructions as may be issued thereanent.

140 "(D) To advise the local board and the directors of any point of legal or other interest to the company which may be developed or come under his or their notice from time to time by legislature or judicial action or otherwise.

"(E) And generally to give his or their best attention to all matters connected with the legal department of the company's business, and to give such information or advice as may from time to time be requested or occur to him or them."

By rules B, C, D and E the company required of the plaintiff important and varied duties not required of Gibbs and held him to responsibility by express contract, which Gibbs was not required to assume, viz:

To be responsible that all mortgages taken are a clear and undisputable first lien upon the subjects mortgaged, and to grant certificates to that effect.

In considering how far the Baxter letter provides for the compensation of the companies' attorney it is pertinent to enquire how the plaintiff was to be compensated for services performed under rules C, D and E, concerning which there cannot be a shadow of a claim that he was to be compensated by fees charged to borrowers for searches, &c. The alleged contract is silent. The law, therefore, will supply what the parties failed to provide for, and implies a promise on the part of the company to pay the reasonable value of such services.

How is it with reference to the services for which recovery is sought in these actions. Is not the matter of the compensation plaintiff was to receive for them left in the same condition as the question of compensation for services required of him under rules C, D and E?

Does the alleged contract, as shown by the Baxter letter, require that such services should be performed for the company without compensation?

It will be observed that the services in question were performed for the company and not for the borrowers, that they were required of the plaintiff by the terms of his appointment, and that his responsibility was to the company alone.

There is nothing in the letter even remotely relating to the compensation to be received by Gibbs or the plaintiff, excepting as to compensation to be received from borrowers for services performed for them, and this is absolutely all there is in case No. 307 relating to the compensation of attorney, the only proof of the alleged contract in that case being the Baxter letter. All that appears in the Baxter letter upon the subject of fees is the following:

"Your professional fees *against borrowers*, including abstracts, searches, investigating titles, preparation and recording of mortgages, shall in no case exceed that the laws of the State warrant, and, although the law might warrant and allow more, shall never exceed what follows:

146 "SCALE OF MAXIMUM FEES TO BE CHARGED BORROWERS BY LAW AGENT.

"For loans under $2,001, 3½ per cent. (exclusive of travelling and hotel bills); for loans under $4,001 and above $2,000, 3 per cent. (exclusive of ditto); for loans

"above $4,000 and under $20,000, 2½ per cent. (do., do.)"

I repeat, this provision relates entirely to fees against borrowers, and not at all to compensation for services performed for the company. The fees to be charged against borrowers were for certain enumerated services performed for them.

The responsibility to the company is treated as a separate and distinct thing. It is a relation of the attorney to the company alone and is provided for in a distinct clause.

There is in cases No. 306 and No. 308 an allusion to compensation for another character of service. Mr. John Leng, in his letter to the plaintiff of December 24, 1876, says:

"I learned in the Eastern States that the mortgage form of one large lending company provides that the expenses paid to the attorney in the event of foreclosure shall be such sum as the court may consider reasonable or a reasonable sum. They say the borrower never objects to this, and the attorney is always allowed what satisfies him. Would it not be well for you to adopt this?"

This conclusively shows that there were services required of the plaintiff which were not to be compensated by the scale of fees against borrowers contained in the Baxter letter, and which scale was the subject-matter of the correspondence between plaintiff and Mr. Leng.

In view of the fact that the Baxter letter contains no provision to the effect that Gibbs should not be entitled to compensation from the company, for services performed for it, or that the compensation received from borrowers should be in full for services performed for the company reference to the rules governing the construction of contracts seems to be unnecessary, but if it is contended that that letter is any evidence upon the subject it should be borne in mind in examining it that "Ambiguities in contracts should be generally construed against the writer."

Heidekoper *vs.* Douglass.
3 Cranch, 171.

A party to a contract may fairly be held bound by what he fairly expressed in the terms used, whether he intended what he expressed or not.

William Cramp & Sons *vs.* Sloan.
21 Fed. Rep'r, 561.
Circuit Ct. (New York) 1884.

Where the words of a contract or of a law or treaty have a plain obvious meaning all construction in hostility with such meaning is excluded.

Green *vs.* Biddle, 8 Wheat., 1.

It is asserted that the Baxter letter contained the terms of Gibb's appointment, but as we have seen, except as to the fees which he was permitted to charge borrowers, it contained no provisions as to his compensation for any services to be performed for the company.

He was required to "do all work and carry through all procedure." What was he to receive for this service. Was he contracting to render professional services unlimited in amount and indefinite in character, for this company in consideration of the privilege of examining titles for borrowers and charging them such fees as his employers might dictate? If so, what clause of the letter shows it? There is no such provision. Compensation for services to be performed for the company was left to be fixed by future agreement.

If it had been the intention of the company when Gibbs was appointed attorney and the Baxter letter written, or when plaintiff was appointed attorney and he was furnished with his appointment with a letter from the secretary of the company, and the rules defining his duties that the attorney should recieve no compensation from the company for the several services and unusual responsi-

bility required of him, it would have been easy to have said so. The reason this was not done is that there was no such agreement.

The company selected the plaintiff as its attorney on account of his ability to serve it and the confidence of its officers in him. They made no loan without his personal responsibility as to the validity and sufficiency of the mortgages and the title of the property mortgaged. They permitted him to charge borrowers for searching records and preparing mortgages, but to keep the charges low and to prevent them from seriously affecting the ability of the company to secure loans at the highest rate of interest and upon good security, they reserved the right to fix the rate of fees. But, evidently, as his appointment was at the pleasure of the company, and his services for the company were likely to be uncertain and variable in amount instead of paying him a fixed salary his compensation was left to be adjusted according to the character and amount of his services.

In cases No. 306 and No. 308 the defendant introduced extracts from a letter of the plaintiff to John Leng, one of the directors of the Oregon and Washington Trust and Investment Company, of September 30, 1876, and a resolution of the company, passed November 23, 1876, but whether for the purpose of showing a new contract between the parties, or the understanding of the parties as to the proper interpretation of the Baxter letter, does not appear. If this evidence was introduced to show a modification of the original contract, then whatever its legal effect may be it did not affect case No. 307, as it was not introduced in that case, and it did not effect plaintiff's claim for services in No. 306, performed prior to the date of the resolution, a period of nearly two years.

The Baxter letter speaks for itself; the language is unequivocal; it needs no extrinsic evidence to aid in its interpretation.

The letter of the plaintiff of September 30, 1876, and the resolution of the board related to a single subject—to one class of services only—to the schedule of fees to be charged against borrowers.

That it did not relate to fees for other services is rendered absolutely certain by the letter of Mr. Leng transmitting the resolution in which he suggests a different measure of compensation to the plaintiff than the one then provided for the foreclosure of mortgages.

If it be kept in mind that the parties were considering a single question—the question whether plaintiff should be required to divide with the manager of the company the fees charged against borrowers (to quote from the letter): "for the examination of titles," there is nothing in the letter of the plaintiff or in the resolution of November 23, 1876, to support the claim of the defendant as to the proper construction of the Baxter letter, or to show that plaintiff was not entitled after the receipt of the resolution of November 23, to compensation for issuing to the company certificates required of him by which he became an absolute guarantor of the title to the property mortgaged to the company, of the validity and sufficiency of their mortgage, and that it was a first lien. I repeat, this correspondence related solely to a division with Mr. Reid of fees charged to borrowers. The company would not as a matter of course, pay plaintiff fees to be divided with Reid, but, it appears was willing that he should have a share of those collected by its attorney from borrowers, for examination of titles, &c., and by no rules of construction can the general words used in discussing this, the only subject under consideration, be extended so as to embrace what was not under discussion at all, namely, what the plaintiff should receive for the direct responsibility he assumed to the company as its attorney, and which was required of

him by the terms of his appointment. As well might it be contended that this correspondence proves that plaintiff was to receive no compensation for foreclosing mortgages, conducting other suits and legal proceedings, giving advice and for performing the multifarious other duties required of him.

But what is the state of the case if the effect claimed for this correspondence is given to it?

The learned judge who presided at the trial charged the jury that the resolution of November 23, 1876, was "a part of the contract made by the parties, the alteration of the contract by the parties to it, and said to them that, in his judgment "the plaintiff was to be fully compensated "for all the services he performed in and about the mort-"gages taken by the defendant by the prescribed fees re-"ceived from borrowers." But if the resolution and the continuance of the plaintiff as attorney for the company under it constitute such a modification of the contract as in the least to effect the plaintiff's right to compensation from the company for the services for which these actions were brought then plaintiff was entitled to recover in case No. 307, because the letter and resolution were not offered in evidence in that case and the right to recover rested entirely on plaintiff's evidence and the Baxter letter, and he was also entitled to recover case No. 306 for his services from January 1, 1875, until he received notification of the resolution of November 23, 1876, a period of about two years.

The court erred in directing the jury to find for the defendant in both these cases, even if the construction placed upon the resolution of 1876 was correct, which is not admitted, unless the Baxter letter establishes the contract set up in the answer that the services for which recovery is sought were to be rendered without charge to the company.

J. N. DOLPH.

In the Supreme Court of the United States.

October Term, 1890.
No. 306.
No. 307.
No. 308.

Ellis G. Hughes, Plaintiff in Error,

vs.

The Dundee Mortgage and Trust Investment Company (Limited).

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF OREGON.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

J. PERCY KEATING,
THOMAS DEWITT CUYLER,
Of Counsel for Plaintiff in Error.

Allen, Lane & Scott, Prs., Phila.

SUPREME COURT OF UNITED STATES.

Ellis G. Hughes, Plaintiff in Error,

vs.

The Dundee Mortgage and Trust Investment Company, Limited, Defendant in Error.

October Term, 1890.

Nos. 306, 307, and 308.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

Inasmuch as all three of these cases are brought by the same plaintiff against the same defendant, and the evidence and charge of the court and specifications of error are the same in all, we have thought best to present but the one brief. To do otherwise would involve a simple repetition.

Before entering upon the discussion of the specifications of error relied upon by the plaintiff in error, we beg leave to call the attention of the court to the pleadings in these causes, as it seems perfectly evident to us that no matter what view the court may take of the action of the trial judge below, it will be utterly impossible for the plaintiff in error to prosecute these cases to a successful conclusion. And, if this be so, we can scarcely believe this court will deem it necessary to enter into the consideration of the errors assigned.

In case No. 306 it will be observed that the services for which the action is brought, as set forth in the complaint (page 3), were rendered to the Oregon and Washington Trust Investment Company between the first day of January, 1875, and the thirty-first day of January, 1880, said services being rendered by the plaintiff as an attorney at law for issuing a certain number of certificates of title upon a similar number of loans.

In case No. 307 (page 3), like services were rendered to the Washington and Oregon Savings Bank, Limited, between the month of August, 1876, and the first of January, 1882 (and for a time subsequent to the latter date).

In No. 308 (page 3), like services were rendered to the defendant during the years 1879, 1880, and 1881.

The answer of defendants is the same in all three cases (except as to amounts, &c.,) and may be found in No. 306, page 5. It sets forth as one of the defenses (see page 8) that plaintiff should not have or maintain his action, because on the twelfth day of February, 1883, he commenced an action at law against defendant in the same matter and in the same court for services rendered as attorney for the Oregon and Washington Mortgage Savings Bank, Limited, between July 1st, 1876, and January 1st, 1882, and for services as attorney to the Oregon and Washington Trust Investment Company, Limited, between January 1st, 1876, and January 1st, 1880, and to the Dundee Mortgage and Trust Investment Company, Limited, defendant, between about January, 1880, and January 1st, 1882. And that such further proceedings were had thereon that the judgment of the court was, on August 15th, 1884, rendered in favor of plaintiff against defendant in the sum of $8407.61 (Hughes *vs.* Dundee Company, 10 Sawyer, 231), which judgment then remained in full force and effect, and in no wise reversed. And further, that all the services alleged in the complaints in the several actions to have been performed by plaintiff were claimed by him to have been rendered before the commencement of said former action, and whatever sum of money was due him on account of such services was due and owing prior to the commencement of said former action and under and by virtue of plaintiff's appointment as attorney for the several corporations mentioned.

The reply to said defense (which may be found in No. 306, on page 10), sets forth (page 14) that it was true that he brought the action alleged and recovered the judgment as alleged, but that within ten days after the rendition of said judgment in said former action, and prior to the commencement of these actions, the defendant took said cause by writ

of error to the Supreme Court of the United States, wherein the said former action was then still pending, by reason of which action on the part of defendant it is estopped from claiming any benefit under said judgment by way of a bar to the recovery by plaintiff in these actions. It will be seen, therefore, that had it not been for the rule of law which prohibits the defendant from assuming the two inconsistent positions of attacking the former judgment and at the same time pleading it, the defense in these cases would have been complete, because no matter whether the services for which these actions were brought were different from the services for which the prior recovery was had, inasmuch as they were all services rendered as attorney under the one agreement and had all been performed before the bringing of the former action, there could be but one recovery, owing to the well-known principle that a plaintiff cannot split up his cause of action (see Hughes *vs.* Dundee Company, 10 Sawyer, 231), wherein the cases are cited and principles discussed.

Now it so happens as a matter of fact, of which it seems to us this court can certainly take judicial cognizance, that the judgment in the former action upon which a writ of error had been taken was subsequently affirmed by this court in Dundee Mortgage Company *vs.* Hughes (124 U. S., 157). It will be perceived at once that the defendant's position is no longer inconsistent, and it will be absolutely impossible under the pleadings, even if these cases should be reversed and sent down for further trial, for the plaintiff to recover. We submit that this court, under such a state of facts, will not go through an idle form, even if an error in the judge's charge should appear, where justice can be so readily administered between the parties at this stage of the proceedings. It is not as if we were asking the court to take cognizance of a judgment which had not been pleaded or offered in evidence. Even before it was affirmed in this court the judgment stood as a final judgment in full force and effect as a bar or estoppel notwithstanding the writ of error, and it was solely the inconsistency in the defendant's position at that time that estopped him from taking advantage of it. (See for full discussion on this point in this very cause,

Hughes *vs.* Dundee, &c., Co., 28 Federal Reporter, page 40.) That inconsistency has been removed by the action of this court, and it seems to us the court should take judicial cognizance of that fact.

If, however, this view does not meet with the approval of the court it remains to examine the points raised by the specifications of error.

The errors relied on are the binding instruction in favor of the defendant, and the further instruction that the jury should make a special finding as to the value of the particular services sued on *over and above* the fees received from borrowers, instead of *independently and apart* from these fees, as plaintiff in error asserts he requested.

It will be observed that if the court was right in withdrawing the case from the jury, the further instruction with reference to the value of the services was immaterial and the question therefore resolves itself into the following points :—

First.—As to the general right of a court under certain circumstances to withdraw a case from the jury.

Second.—As to whether the evidence in this case justified the court in applying the principle.

First.—It seems scarcely necessary to discuss the general principle that under certain circumstances it is the province of the court and not the jury to construe the evidence.

"If the testimony is of such a conclusive character as would compel the court in the exercise of a sound discretion to set aside the verdict if one were returned in opposition to such testimony, the jury may be controlled in their determination of the question by a peremptory instruction."

Montclair *vs.* Dana, 107 U. S., 162.

"Where there are no disputed facts in the case the court may properly tell the jury in an absolute form how they should find."

Bevans *vs.* United States, 13 Wallace, 56;
Walbrun *vs.* Babbitt, 16 Wallace, 577.

In the case of Hendrick *vs.* Lindsay *et al.* (U. S., 147) the court says: "This was correct practice where there was no evidence at all to contradict or vary the case made by plaintiffs, and the only question for review here is whether or not the court mistook the legal effect of the evidence."

In Pleasance *vs.* Fant (22 Wallace, 120) the court says: "No doubt there are decisions to be found which go a long way to hold that if there is the slightest tendency in any part of the evidence to support plaintiff's case, it must be submitted to the jury, and in the present case if the court had so submitted it with proper instructions, it would be difficult to say that it would have been an error of which the defendant could have complained here. But, as was said by this court in the case of Improvement Company *vs.* Munson (14 Wallace, 448), recent decisions of high authority have established a more reasonable rule, that in every case before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the *onus* of proof is imposed. * * * In the case of Parks *vs.* Ross (11 How., 362) this court held that the practice of granting an instruction like the present had superseded the ancient practice of demurrer to evidence, and that it answered the same purpose and should be tested by the same rules; and in that case it said the question for the consideration of the court was whether the evidence submitted was sufficient to authorize the jury in finding the contract set up by plaintiff. And in Schuchardt *vs.* Allen (1 Wallace, 359) this case is referred to, establishing the doctrine that if the evidence be not sufficient to warrant a recovery it is the duty of the court to instruct the jury accordingly. * * * Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies when it is clear to the judicial mind that if the jury should find a verdict in favor of the plaintiff that verdict would be set aside and a new trial be had? Such a proposition is absurd, and accordingly we hold the true principle to

be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for plaintiff, the court should say so to the jury."

In Merchants' Bank *vs.* State Bank (10 Wallace, 637) the court says: "According to the settled practice in the courts of the United States it was proper to give the instruction if it were clear the plaintiff could not recover. * * * In considering the motion the court proceeds upon the ground that the facts stated by the witnesses examined by plaintiff are true, but that those facts as proved, with every inference which the law allows to be drawn from them, would not warrant the jury in finding a verdict in his favor. When viewed in that light the plaintiff's case, as shown by the evidence, presents a question of law, and it is well settled by the decisions of this court that it is the duty of the circuit court to give the instruction whenever it appears that the evidence is not legally sufficient to serve as the foundation of a verdict. (Page 655.) * * * Courts of justice have sometimes said that it is necessary in all cases to leave the question to the jury if there is any evidence, even a *scintilla*, in support of the issue, but it is well settled law that the question for the judge is not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. (Page 665.)

In Drakely *vs.* Gregg (8 Wallace, 268) the court says: "If in the opinion of the court there were no material, extraneous facts bearing upon this question, and the contract relied on must be determined by the *commercial correspondence alone*, then (it was the duty of the court) to have interpreted this correspondence and have informed the jury whether or not it proved the contract to be of the character contended for by plaintiffs in error."

The *scintilla* doctrine is not recognized in the United States Courts.

Hathaway *vs.* R. R., 29 Fed. Rep.

If the evidence consists of writings it is the duty of the court and not the jury to construe them as to their legal effect.

In Levy *vs.* Gadsby, 3 Cranch Rep., 180, Chief Justice Marshall says: "In this case the question arises upon a written instrument, and no principle is more clearly settled than that the construction of written evidence is exclusively for the court."

"It is well-settled law that written instruments are always to be construed by the court; and except when they contain technical words or terms of art, or when the instrument is introduced in evidence collaterally, and where its effect depends not merely upon the construction and meaning of the instrument, but upon extrinsic facts and circumstances, in which case the inference to be drawn from it must be left to the jury."

Goddard *vs.* Foster, 17 Wallace, 123, 142.

The construction of a written contract is a question of law for the court, and it is error to submit such a question to the jury.

Lapeer Ins. Co. *vs.* Doyle, 30 Mich., 159;
Eyser *vs.* Weissberger, 2 Iowa, 463;
Levy *vs.* Gadsby, 3 Cranch, 180;
Streeter *vs.* Streeeter, 43 Ill., 155;
Drew *vs.* Towle, 50 N. H., 531;
Shepperd *vs.* White, 11 Tex., 346;
Thomas *vs.* Thomas, 15 B. Mon., 178;
Smith *vs.* Faulkner, 12 Gray, 251;
Wavren *vs.* Jones, 51 Me., 146;
Bank *vs.* Berry, 52 Me., 293;
Emery *vs.* Owings, 6 Gill, 191;

and other cases cited in "Charging the Jury" by Thompson, page 16.

The rule that the obligation is upon the court to expound a written contract exists in as full force where the contract rests in a number of letters and answers as were embodied in

a single instrument, or where a subsequent contract has been entered into, modifying a previous one.

Goddard *vs.* Foster, 30 Zug. L. & E., 508;
Lockhart *vs.* Ogden, 30 Cal., 547;
N. S. *vs.* Shaw, 1 Cliff, 317;
Rauney *vs.* Higby, 5 Wis., 62;
Bank *vs.* Berry, 52 Me., 293.

So much, then, for the principle. We come now to the second question.

Did the evidence in these cases justify the court in applying the rule.

The evidence consists of letters and printed rules, from which the agreement in question is to be construed. It was admitted in open court (No. 306, page 17; No. 307, page 17; No. 308, page 14), that plaintiff had taken his appointment as attorney of all the companies on the same terms as his former partner, Gibbs, held his, save only as they might be varied by the resolution, the letter of the secretary, and the printed rules offered in evidence by plaintiff. The terms of the appointment of his former partner are evidenced by what is known as the "Baxter letter." (No. 306, page 18; No. 307, page 17; No. 308, page 14.) And it will be seen that under this letter plaintiff's duties as attorney of the company were:—

Under clause (1), "To do all work and carry through all procedure, and see to the registration and publication of deeds requisite and necessary for giving and securing to the company valid and effective first and preferable mortgages over real estate for such loans as the directors at Dundee may from time to time sanction and authorize."

Under clause (5), the preparing of "abstracts, searches, investigating titles, preparation and recording of mortgages."

It will be observed that up to this point there is no provision in exact terms that as part of the duties of Mr. Gibbs he shall give *certificates of title* (which is the subject-matter of these actions), though of course the duties imposed upon him by the clauses cited would necessarily include the imparting of knowledge as to the validity of liens to the company, otherwise no loans would be effected whatever. It was not

until Mr. Hughes, the present plaintiff, became by appointment attorney of the company under the terms of the resolutions of September 17th, 1875 (306, page 16; 307, page 16; 308, page 12), that that duty was imposed on him under clause B, which recited that "he shall be responsible that all mortgages taken are a clear and indisputable first lien upon the subjects mortgaged, and *grant certificates to that effect.*" If it be argued that the granting of certificates was included under the sixth clause of the Baxter letter, to wit, the responsibility for the validity of loans (306, page 18), the reply is that that clause was on Hughes' appointment, substituted by clause *B* of the rules (306, page 17), where for the first time we find the duty of granting certificates in express terms set forth. Now it was subsequent to this change in the contract that the controversy as to fees arose, which resulted in a further modification and alteration of the contract. The evidence discloses the fact that at the time of Hughes' appointment it was customary for the company's attorney to share in certain proportions with the company's manager, Mr. Reid, the fees charged to borrowers. Mr. Hughes in 1876 (306, page 19), objected to this division in a letter, wherein he says: "The business of the company is now in such a prosperous condition as I think entitles me to ask that I be allowed to receive *for my services in their behalf* at least the minimum fees charged for like services by gentlemen in equal standing in my profession here, which would be the entire fees now charged to borrowers, and out of which there is now paid Mr. Reid one-half of one per cent., on the entire amount of the loan. It would be no object to, but in fact *a loss for me to continue to act in future as the attorney of the company, if the fees actually received by me are to continue as at present.*" In reply to this communication came a resolution of November 23d, 1876, as follows: "Attorney: *That Mr. Hughes, the company's attorney, be remunerated by fees charged borrowers* in terms of scale of March, 1875, and now current. The directors trust that these rates of remuneration, which, along with the relative appointment, are to continue during their pleasure, will be satisfactory to all concerned."

It would seem, therefore, that even had there been any question as between Mr. Gibbs and the company as to whether the services set forth in clause 6 of the Baxter letter (to wit, the responsibility to the company for the validity and sufficiency of mortgages) were or were not compensated by the fees charged to borrowers, so far as Mr. Hughes is concerned, that responsibility was incorporated into the very body of the agreement with him, together with the granting of certificates, and the resolution distinctly declares that for all these services he was to be remunerated by fees charged to borrowers.

It would appear from the charge of the court in the trial of the case below (306, page 22), that the counsel for plaintiff rested his claim mainly on the sixth clause of the Baxter letter, asserting that inasmuch as the fifth clause did not contain the words "certificate of title," this certification of title was not part of the duties to borrowers for which he was to be paid by the fees from borrowers.

The learned judge, it seems to us, very rightly thought such a construction narrow and unreasonable for the reason that under the terms of the employment for which plaintiff was compensated by fees from borrowers, he certainly had to inform the company of the result of his investigation, and the mere manner of so doing was immaterial. If we add to this reasoning the additional consideration that the Baxter letter is to be read in the light of the subsequent letters, rules, and resolutions covering Hughes' appointment, the conclusion is irresistible that Hughes was expected and did expect to give that information which was the result of his labors for no other compensation than what those labors called for. Nor is such a conclusion unreasonable, inasmuch as the responsibility involved in giving such certification is not an absolute guarantee of title, but simply the usual responsibility of an attorney in the performance of his duties as such. Not only is this principle well established, but it has received judicial sanction as applied to this very contract in Dundee Company *vs.* Hughes (10 Sawyer, 144).

J. PERCY KEATING,
THOMAS DEWITT CUYLER,
Of Counsel for Defendant in Error.